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No. 95-891

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF OHIO,
Petitioner,

v.

ROBERT D. ROBINETTE,
Respondent.

On Petition For Writ of Certiorari
To The Ohio Supreme Court

BRIEF FOR AMICI CURIAE STATES OF ARIZONA, FLORIDA, IDAHO, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, OKLAHOMA, RHODE ISLAND, TEXAS AND WYOMING IN SUPPORT OF PETITIONER STATE OF OHIO

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QUESTION PRESENTED - AMICUS FORMULATION

AFTER CONCLUDING A LEGITIMATE TRAFFIC STOP, ARE POLICE OFFICERS REQUIRED UNDER THE CONSTITUTION TO GIVE A PROPHYLACTIC, MIRANDA-LIKE WARNING (E.G., "AT THIS TIME YOU ARE LEGALLY FREE TO GO") BEFORE ASKING ANY ADDITIONAL QUESTIONS OF THE DRIVER OR BEFORE ASKING THE DRIVER'S CONSENT TO SEARCH THE VEHICLE?

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STATEMENT OF AMICUS INTEREST

In the decision below, the Ohio Supreme Court invented a new doctrine of federal constitutional law, one that will place additional obstacles in the path of legitimate law enforcement and one that flatly contradicts several precedents from this Court. The court held that after a legitimate traffic stop has ended, the police officer must warn the driver "At this time you are legally free to go" before asking the driver any additional questions or requesting the driver's consent to search the vehicle. *State v. Robinette*, 73 Ohio St.3d 650, 655 (1995). Accordingly, under the Ohio Supreme Court's decision, even though a driver voluntarily consents to a search (as happened here) and even though the police then find contraband in the car (as also happened here), the evidence nonetheless must be suppressed and the defendant allowed to go free.

Until now, that was not the law in this Court or any other. Time and again, this Court has made clear that there are no *per se* rules governing law enforcement efforts in this area of Fourth Amendment jurisprudence -- either at the federal level or with respect to the 50 States. The question whether a police encounter is consensual under the Fourth Amendment has always been one of context and reasonableness, focused on the facts and circumstances surrounding the event. Thus, as this Court has repeatedly held, "a person has been 'seized' within the meaning of the Fourth Amendment, *only if*, in view of all of the facts and circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (emphasis added). *See also Florida v. Bostick*, 501 U.S. 429 (1991); *California v. Hodari D.*, 499 U.S. 621 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Rodriquez*, 469 U.S. 1 (1984); *INS v. Delgado*, 466 U.S. 210 (1984);

Florida v. Royer, 460 U.S. 491 (1983) (plurality opinion); *cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

In laying waste to this well-established doctrine, the Ohio Supreme Court has not just made new law but has also irreparably interfered with legitimate law enforcement techniques. Amici States thus are broadly concerned about the impact of the Ohio Supreme Court's decision on future law enforcement efforts. Consensual encounters between police and citizens arise in a wide variety of contexts -- not just traffic stops, but also at airports, on buses, in immigration factory sweeps, and on the streets. Today this decision limits a legitimate law enforcement technique in the seventh largest State in the country; but tomorrow it may well begin to limit this technique in other jurisdictions as well, particularly if a "*cert. denied*" notation is allowed to follow the case.

Just as importantly, consensual encounters most often arise in the context of drug interdiction efforts. For this reason, as Justice Powell correctly observed, courts should be particularly careful not to curb time-honored law enforcement efforts unnecessarily in this area:

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin may be easily concealed. As a result, the obstacles to detection of illegal conduct

may be unmatched in any other area of law enforcement.

United States v. Mendenhall, 446 U.S. 544, 561-62 (Powell J., joined by Burger C.J. and Blackmun J., concurring in part and concurring in the judgment). By imposing a requirement that police advise a person "At this time you are legally free to go," Amicus States believe that the Ohio Supreme Court has illegitimately impaired police reliance on consensual encounter as a tool of law enforcement and in the process has hampered one more law enforcement technique in the national effort to curb illegal drug trafficking and use. Accordingly, for this reason and those elaborated below, Amici States join together in asking this Court to review and reverse the Ohio Supreme Court's erroneous decision.

ADDITIONAL STATEMENT OF THE FACTS

It is difficult to overstate the importance of the trial court's findings of fact in this case. The court determined that respondent Robinette knew that the traffic stop had been concluded and that he was free to leave at the time he gave consent to search his car. This determination was supported most credibly by the testimony of Robinette himself. During cross-examination at the motion to suppress hearing, Robinette testified as follows:

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A. Yes.

Q. And you indicated that then he asked you whether or not you had contraband in that vehicle; is that correct?

A. Yes.

Q. And you -- and you obviously knew that you could answer that either yes or no; isn't that true?

A. Yes.

See Appendix *(State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Tr. page 27). No Ohio appellate court has reversed the trial court's well-supported (if not required) conclusion that Robinette voluntarily and freely consented to the search of his car. In spite of this unrebutted conclusion and the unrebutted testimony that supports it, the Ohio Supreme Court determined that no reasonable person would feel free to leave after a traffic stop had ended and that no reasonable person could voluntarily consent to a search in that context. In reaching this conclusion, the Ohio Supreme Court conspicuously fails to discuss or for that matter even acknowledge Robinette's testimony under oath that he did feel "free to leave" the scene at the time he gave consent to search his car.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE OHIO SUPREME COURT, WHICH DISREGARDED CLEARLY-ESTABLISHED FOURTH AMENDMENT PRECEDENT OF THE UNITED STATES SUPREME COURT ON A FUNDAMENTAL ISSUE OF FEDERAL LAW.

A. Introduction.

The 4-3 decision of the Ohio Supreme Court in this case is premised on policy determinations about what type of law enforcement techniques are proper and about what type of law enforcement techniques are necessary. However prudent or wise these views may be, they are not consistent with this Court's precedents concerning consensual encounters and indeed hardly even pretend to be. The Ohio Supreme Court's holding flatly contradicts established law in at least three areas. First, the decision establishes a "bright line" test for assessing the Fourth Amendment validity of a consensual encounter, while this Court has repeatedly held that a "totality of the circumstances" test is required in this area. Second, the decision requires law enforcement officers to give a specific warning to insure the voluntariness of any consensual encounter, while this Court has specifically rejected the necessity of such a warning. Finally, the decision appears to hold that mere questioning of a citizen after a legitimate traffic stop constitutes an illegal seizure, while this Court has made clear that mere police questioning does not constitute a "seizure." The Court should grant certiorari to reaffirm its prior precedents in the face of a decision that wholly ignores them.

B. This Court Has Specifically Rejected *Per Se* Tests For Assessing The Validity Of A Consensual Encounter.

As an initial matter, there can be no debate that the Ohio Supreme Court used this case to establish a *per se* test with respect to Fourth Amendment consensual encounters. In plain terms, the decision says:

> We also use this case to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation.

Robinette, 73 Ohio St.3d at 652. Whatever the merits of a *per se* test may be as a matter of policy, this Court has repeatedly rebuffed attempts to impose such a requirement. In *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988), for example, the Court rejected just such an attempt in the context of investigatory pursuits:

> Both petitioner and respondent, it seems to us, in their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account "'all of the circumstances surrounding the incident'" in each individual case. *INS v. Delgado*, 466 U.S. 210, 215 (1984), quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Opinion of Stewart J.). Rather than adopting either rule proposed by the parties and

> determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach and determine only that, in this particular case, the police conduct did not amount to a seizure.

Similarly, in *Florida v. Bostick*, 501 U.S. 429 (1991), the Court rejected a *per se* rule that all requests by police officers for consent to search the luggage of bus passengers are improper. In doing so, the Court reversed a lower court decision that, like this one here, attempted to establish a new *per se* rule in the area. The Court remanded the case back to state court for a ruling on the factual question that this Court has long used to distinguish "consensual encounters" from illegal "seizures" -- whether the person felt "free to leave" at the time of the encounter.

This fact-intensive test was first articulated by Justice Stewart fifteen years ago. "We conclude," he wrote,

> that a person has been "seized" within the meaning of the Fourth Amendment, only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

United States v. Mendenhall, 446 U.S. at 555. The standard has been followed without hesitation in a wide variety of settings. *See, e.g., Bostick* (bus passengers); *Chesternut* (investigatory pursuit); *INS v. Delgado*, 466 U.S. 210 (1984) (factory sweeps); *California v. Hodari D*, 499 U.S. 621 (1991) (police chase).

As this Court has recognized, this flexible approach has many merits. As an initial matter, it is textually based.

A facts-and-circumstances standard follows naturally from the relevant text of the Fourth Amendment, which refers only to "reasonable searches and seizures." What is more, the standard diminishes the risk that constitutional (*i.e.*, "reasonable") searches and seizures will be too quickly condemned as unconstitutional, in the end prohibiting the use of probative, necessary and legitimate evidence. This case is a perfect example. Even though respondent took the stand and admitted under oath that he felt "free to leave" when the officer asked for consent to search his car, the fruits of that search were suppressed. As Justice Stewart noted, "characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *Mendenhall*, 446 U.S. at 555. Quite simply, the lower court's *per se* test is at odds with this Court's precedents and imposes "wholly unrealistic restrictions" upon time-tested and legitimate methods of law enforcement.

C. This Court Has Specifically Rejected The Suggestion That A Prophylactic Warning Must Be Given In Order For Police To Engage In A Consensual Encounter.

In evaluating whether a reasonable person would "feel free to leave" at the time he or she is approached by a police officer, the presence of advice by the officer as to the person's legal status may well be an appropriate component of the equation. But this Court has never held that it is decisive. The Court has never required such a warning and indeed has specifically rejected the necessity of one. In *INS*

v. Delgado, 466 U.S. at 217, the Court left little room for debate on the point: "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." (Citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-34 (1973)). The Court stressed the same point in *Mendenhall*: "Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend on her having been so informed." 446 U.S. at 555. In the final analysis, the Ohio Supreme Court simply exceeded its authority in requiring police officers to make prophylactic warnings before all consensual encounters.

D. This Court Has Specifically Rejected The View That Questioning Alone Amounts To A "Seizure."

The Ohio Supreme Court also claimed that this Court's cases concerning consensual encounters were not applicable because a separate and illegal detention followed the initial and valid traffic stop of respondent Robinette. The court specifically found that the traffic stop ended when the officer determined he would not issue a ticket, making any later questioning the necessary product of an illegal detention. The short answer to this contention is that the request to search did not occur until after the police officer had returned Robinette's license. Thus, even assuming the officer held onto Robinette's license longer than he should have to conclude the traffic stop, the officer's critical requests for authority to search for contraband occurred well

after Robinette knew he was free to leave, as indeed he testified.

The real thrust of the lower court's decision, what amounts to the holding in the case, is the view that *any* questioning following a valid detention is necessarily so coercive as to refute any and all claims by police that a "consensual encounter" had occurred. As the court itself determined:

> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accoutrements of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Robinette, 73 Ohio St.3d at 655. As shown above, this view simply does not square with existing precedent on consensual encounters, and has the potential to threaten precedent establishing that mere questioning by one in authority is not sufficient to constitute a seizure.

"Since *Terry*," the Court has noted, "we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion), for example, we explained that 'law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.'" *Bostick*, 501 U.S.

at 434. *See also INS v. Delgado*, 466 U.S. at 215 ("What is apparent from *Royer* and *Brown* is that police questioning, by itself, is unlikely to result in a Fourth Amendmert violation"); *Florida v. Rodriquez*, 469 U.S. 1 (1984). Notwithstanding these precedents, the court below appears to have converted mere questioning after a traffic stop into a *per se* seizure. Thus, while the court below is careful to recognize the concept of a consensual encounter, its decision eviscerates the very premise upon which such encounters are based.

E. The Decision Below Will Substantially and Unnecessarily Restrict Drug Interdiction Efforts In Ohio And Possibly Other States.

As indicated in the Statement of Amici interest, the Amici States fear that the decision of the court below will have severe consequences for local drug interdiction efforts. Use of consensual encounters in drug interdiction occurs in numerous contexts -- road-side stops, buses, airports -- and has long been a critical and effective law enforcement tool. *See Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. Crim. L. 1109 (1992). In 1994 and 1995 alone, Ohio police officers initiated 408 criminal narcotic prosecutions based on consents to search. Similarly, between 1992 and 1995, in 20 cases in which consents were obtained in "car" cases, Highway Patrol officers confiscated drugs and currency worth $5,347,988. *See Appendix (*Report of S. Lt. W.D. Healy, December 11, 1995). Left unreviewed, the Ohio Supreme Court's is apt to diminish, if not destroy, successful law enforcement efforts like these in the future.

CONCLUSION

For the foregoing reasons, amici States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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COUNSEL FOR AMICI STATES

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
	:	CASE NO. 92-CR-2800
Plaintiff,	:	
	:	
v.	:	
	:	
ROBERT D. ROBINETTE,	:	
	:	
Defendant.	:	

BY MS. SORRELL:

Q. I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?

A Yes.

Q And you indicated that then he asked you whether or not you had contraband in the vehicle; is that correct?

A Yes.

Q And you -- and you obviously knew that you could answer that either yes or no; isn't that true?

A Yes.

Q And although you could have automatically said yes, that being the truth, you, in fact, said

automatically no; isn't that correct?

Mr. Ruppert: Objection.

The Court: Well -

Mr. Ruppert: that again goes to the merits of the issue. There are actually three answers; yes, no, and I don't know. Actually, four; I don't have to answer that.

The Court: Except that apparently this has to do with something that may be contained on the stipulated exhibit.

INTER-OFFICE COMMUNICATION

Date December 11, 1995 File No. 3CAS

Level General
To Major R.N. Rucker Attention _____

From S.Lt. W.D. Healy, TDIT Unit Coordinator

Subject-Consent to Search Cases involving Divisional Officers

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On December 6, 1995, Carol O'Brien from the Ohio Attorney General's Office contacted me reference their need to have some statistical information from the Division concerning consent to search cases. The Ohio Attorney General's Office is filing an amicus brief with the United State Supreme court in support of an appeal filed by the Montgomery County Prosecutor (Mathias Heck) on the recently decided Ohio Supreme Court case entitled *State v. Robinette*. The Robinette case dealt with the Ohio Supreme Court's decision requiring law enforcement officers to inform a violator that they are "legally free to leave" prior to requesting a consent to search. The Ohio Attorney General's office would like the Ohio Supreme Court's decision to be reviewed and reversed by the United States Supreme Court; should they decide to grant certiorari and agree to hear the case.

Attached is a synopsis of twenty (20) significant drug or currency seizure cases over

the past 3 years involving TDIT personnel utilizing consent to search authority.

In addition, officers from throughout the state have initiated 408 criminal narcotics cases over the past two (2) years (1994 and 1995) in which consent to search was utilized to locate the narcotics. This information was obtained from the divisional Case Management Systems (CMS) maintained by the Office of Investigative Services.

This information was faxed to the Ohio Attorney General's Office for their use in assisting in the development of the amicus brief for the United States Supreme Court.

TRAFFIC AND DRUG INTERDICTION TEAMS (TDIT)

CONSENT TO SEARCH CASE INVESTIGATIONS

COCAINE SEIZURES:

DATE INCIDENT	AMOUNT	DESCRIPTION OF
8-21-94	19 pounds	Numerous drug courier indicators observed; consent to search was granted which revealed several screw heads around heater core to be extremely clean while the rest were dirty; housing around the heater core removed which revealed 19 pounds of cocaine.
10-18-92	5 pounds	Consent to search requested which revealed 5 pounds of cocaine under the rear seat.

MARIJUANA SEIZURES

DATE INCIDENT	AMOUNT	DESCRIPTION OF
1-27-93	622 pounds	Ryder rental truck; consent to search granted which revealed 622 pounds of marijuana in 16 U-haul

		cardboard boxes mixed in with used furniture.
4-24-95	267 pounds	Consent to search was granted which revealed 267 pounds of marijuana in a modified false compartment underneath the floor of the vehicle; compartment was made out of steel and ran the entire length of the Chevrolet Suburban passenger area.
6-19-93	158 pounds	Consent to search granted which revealed 158 pounds of marijuana in 4 large garbage bags in the trunk.
2-28-95	143 pounds	Consent to search granted which revealed the front door windows would not roll down; door panels were removed which revealed marijuana; a total of 143 pounds was found in various natural cavities of the vehicle.
7-31-94	110 pounds	Consent to search granted which revealed 110 pounds of marijuana inside luggage secured to the top of the vehicle and tied down with ropes and covered with a tarp.

1-10-94	101 pounds	Consent to search granted which revealed 101 pounds of marijuana in the trunk.
12-1-93	50 pounds	Consent to search was granted which revealed two (2) electronically controlled compartments in the rear seat arm rest panels which revealed 50 pounds of marijuana.
6-19-93	44 pounds	Consent to search was granted which revealed a hidden compartment in the vehicle's gas tank containing 44 pounds of marijuana.
6-8-93	40 pounds	Consent to search was granted which revealed 40 pounds of marijuana in 2 large suitcases and 1 duffel bag in the trunk.
3-16-94	33 pounds	Consent to search was granted which revealed 33 pounds of marijuana found in the natural cavities of the vehicle's quarter panel area.
3-30-95	10 pounds	Consent to search was granted which revealed 10 pounds of marijuana under the rear seat.

CURRENCY SEIZURES

DATE INCIDENT	AMOUNT	DESCRIPTION OF
4-13-94	$439,844.00	Consent to search granted which revealed a false door under the passenger compartment of the vehicle; a trap door was located under the rear seat and the compartment had $439,844.00 cash inside.
2-24-94	$67,400.00	Consent to search granted which revealed $67,400.00 cash in 13 separate envelopes and a loaded 9MM handgun in the passenger compartment
7-7-95	$37,000.00	Consent to search granted which revealed 3 electronic compartments in the back seat area; 2 of the compartments were empty; the other compartment was found in the right rear seat arm rest panel area and contained $37,000 cash.
2-3-93	$35,500.00	Consent to search granted which revealed $35,500.00 cash in the right rear door panel.

7-31-92	$30,600.00	Consent to search granted which revealed $30,600.00 cash in a shoe box on the back seat.
7-29-94	$30,399.00	Consent to search granted which revealed $30,399.00 cash in the back end of a Ryder rental truck mixed in with furniture and clothing.
3-10-93	$29,980.00	Consent to search granted which revealed $29,980.00 cash under the rear seat.

The following is a review on the total value of the seizures involving consent searches:

COCAINE	24 POUNDS	STREET VALUE
OF $1,090,900.00		
MARIJUANA	1,578 POUNDS	STREET VALUE
OF $3,586,365.00		
CURRENCY		VALUE
OF $6780,723.00		

TOTAL VALUE = $5,347,988.00